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No. 84-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *et al.*,

Petitioners,

v.

HAROCO, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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QUESTION PRESENTED FOR REVIEW

Whether the court below was correct in holding that the plaintiff's allegations of a cause of action under the Racketeer Influenced and Corrupt Organizations Act were sufficient to withstand a motion to dismiss.

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INTEREST OF THE AMICUS CURIAE

The American Bankers Association respectfully submits this brief as amicus curiae, with the consent of the parties, to urge that the Court grant the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit. In that decision, the Court held that it was unnecessary for a

plaintiff to plead and prove any kind of special "racketeering injury" in order to show its entitlement to treble damages under the Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"). It was sufficient for the plaintiff to plead and prove injury arising solely from the commission of two or more "predicate acts," i.e., individual acts of racketeering activities such as the alleged mail fraud in this case. The Court also held that the same entity could not be both a "person" and an "enterprise" within the meaning of the statute, but that a parent company and its subsidiary (if they are distinct legal entities) can fill both roles. Finally, the Court held that the degree of specificity expected in a criminal RICO bill of particulars is not required at the pleadings stage in a civil RICO case. In each respect, the Court acted inconsistently with the reported decisions of other United States courts.

The American Bankers Association is the principal trade association of the commercial banking industry in the United States. Its membership comprises approximately 90% of all American banks, and ABA member banks are located in each of the fifty states and the District of Columbia. This case involves a civil claim that a commercial bank violates the Racketeer Influenced and Corrupt Organizations Act when it lends money at an interest rate tied to the "prime rate" while at the same time making loans to other borrowers "below prime." Other commercial banks have been targets in suits with similar allegations in at least fifteen states, located in at least ten of the circuits. Commercial banks have also appeared as plaintiffs in civil lawsuits charging violations of the RICO statute. *See, e.g., Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984)(No. 84-657).

As more fully appears below, there is considerable conflict among the circuits, and among federal district courts, over a variety of issues involved in the interpretation and application of RICO. This conflict and the resulting confusion has a direct, immediate and serious impact upon a large segment of our memership. As a representative of the industry, the American Bankers Association believes it is well positioned to describe and discuss the issues raised in this case from a different and unique perspective.

SUMMARY OF THE ARGUMENT

The decisions of the Seventh Circuit in this case, and of the Second Circuit in the other civil RICO cases now pending before the Court on petitions for writs of certiorari present a classic case of a dispute among the circuits for which the Supreme Court ought to grant review under Rule 17.1(a) of the Supreme Court Rules. The conflict among the circuits is not limited to a single point of law, but rather to three or four distinct differences among the courts over the interpretation of the same law. They are disputes which are irreconcilable and which defy solution in the absence of a definitive judgment from this Court. In addition, litigation under the civil provisions of RICO is not a remote or specialized area of the law, having little relevance or interest to the lower courts or the bar. To the contrary, there has been a veritable explosion of civil RICO litigation in the past few years, with a great many cases still pending before trial or appellate courts at one stage or another. The courts and the bar need definitive guidance on how to resolve the many complicated issues arising from such litigation. While the Supreme Court has rendered decisions on the criminal aspects of the law, it has not yet

had occasion to deal with the civil provisions of RICO. The issues raised by this case are thus important issues of federal law which ought to be settled by the Supreme Court under Rule 17.1(c) of the Supreme Court Rules.

ARGUMENT

I

Decisions of the U.S. Courts of Appeals interpreting the civil liability sections of the Racketeer Influenced and Corrupt Organizations Act are irreconcilable.

The Racketeer Influenced and Corrupt Organizations Act provides in relevant part that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." (18 U.S.C. § 1964(c)(1970)) (emphasis added). Section 1962, in turn, makes it unlawful for a *person* who has engaged in a pattern of racketeering activity to take part in the ownership, control, establishment, operation or participation in the conduct of the affairs of an *enterprise* engaged in or affecting interstate commerce. "Racketeering activity" is defined in Section 1961(1) as the commission of any of a series of criminal acts *chargeable* under state law and punishable by imprisonment for more than one year or any act which is *indictable* under various federal criminal statutes, including mail fraud and wire fraud. A "pattern" is the commission of two such acts within ten years of one another (18 U.S.C. § 1961(5)(1970)).

The statute immediately raises several questions of interpretation, which have received differing answers from the courts. First of all, how shall the words "by

reason of" be construed? A plaintiff is entitled to treble damages if he is injured by reason of a violation of the section of the law which prohibits a pattern of racketeering activity, not the commission of the specific offenses themselves which together make up the pattern since those are prohibited elsewhere. In this case, the Seventh Circuit has held that injury arising from the commission of two or more of the so-called predicate acts constitutes injury by reason of a violation of Section 1962, and that there is no need for the plaintiff to establish some sort of injury above and beyond the injury attributable solely to the commission of the predicate acts. *Haroco Inc. v. American National Bank & Trust Co.*, No. 83-2529, slip op. at 17 (7th Cir. Oct. 19, 1984). In this determination, the Seventh Circuit expressed its substantial agreement with the Fifth Circuit (*Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1169 (5th Cir. 1984)), and its disagreement with the conclusions of the Second Circuit in the *Sedima* trilogy (*Sedima S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 494 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 22, 1984) (No. 84-648); *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657); *Furman v. Cirrito*, 741 F.2d 524, 525 (2d Cir. 1984), *petition for cert. filed, sub nom. Joel v. Cirrito*, 53 U.S.L.W. 3343 (U.S. Oct. 15, 1984) (No. 84-604). The Second Circuit, on the other hand, construes the "by reason of" language as

> a way to limit standing to sue under RICO to people hurt by an injury of the type RICO was intended to prevent. RICO was intended not simply to provide additional remedies for already compensable injuries, but rather to provide added remedies and procedures to fight certain specific kinds of organized

> criminality. The "by reason of" language, therefore, requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by such predicate acts as are alleged here.

Sedima, 741 F.2d at 494 (footnote omitted).

A second question of interpretation is whether the same corporation can at the same time be both a "person" who engages in racketeering activity and the "enterprise" controlled, owned or operated by the liable "person." In this case, the Seventh Circuit, agreeing with the Fourth Circuit's opinion in *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), held "that section 1962(c) requires separate entities as the liable person and the enterprise which has its affairs conducted through the pattern of racketeering activity." *Haroco*, slip op. at 32. In reaching this conclusion, the court acknowledges its disagreement with the Eleventh Circuit opinion in *United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). The Seventh Circuit reasoned that when Congress used the terms "employed by" and "associated with" in the statute, it clearly contemplated that a "person" would be separate and distinct from the "enterprise." The Eleventh Circuit, on the other hand, maintained that there is little, if any, practical difference between a corporation and an "association" which clearly can serve in both roles. Moreover, the Eleventh Circuit relied upon the liberal construction clause of the statute in order to reach its conclusion, since it thought that construction was necessary to effectuate the objects of the law. Congress could not have intended to allow a corporation to escape liability under RICO by hiding behind its

corporate form where it is the central figure in a criminal scheme. *Hartley*, 678 F.2d at 989.

A subsidiary question under the person/enterprise problem is whether a corporation and its parent or subsidiary or affiliated corporation constitute sufficiently separate and distinct entities so that one may satisfy the "person" requirement and the other the "enterprise" requirement of RICO. In this case, American National Bank is alleged to be the "person," conducting, through a pattern of racketeering activity, the affairs of its parent corporation, Heller International. The Seventh Circuit held that "[t]hat is a good allegation under section 1962(c)." *Haroco*, slip op. at 37. In so holding, the court acknowledged a recent decision of this Court in which it was held that a parent and a wholly owned subsidiary are incapable of conspiring with one another for purposes of the antitrust laws. *Copperweld Corporation v. Independence Tube Corp.*, 104 S.Ct. 2731, 2742 (1984). Nevertheless, the *Haroco* court attempts to distinguish away the precedent, claiming that it does not extend to RICO because of different premises behind RICO and the antitrust laws.

The next question of statutory construction raised by RICO in this case concerns the degree of specificity with which a plaintiff must allege the commission of the "predicate offenses." This is a civil action for damages, and under ordinary circumstances the liberal rules of "notice" pleading would be applicable rather than the more stringent requirements for pleading criminal charges. But RICO is not an ordinary civil claim. The law specifically defines the racketeering activity for which a defendant may be held liable as the commission of two or more acts *chargeable* or *indictable* under state or federal law. One cannot very well be charged or indicted on the kind

of generalities which would be allowed in normal civil litigation. At least two U.S. District Courts have held that the use of this terminology in the statute requires that the plaintiff must plead the predicate acts of racketeering with enough specificity to show that there is probable cause to believe the crimes were committed. *Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co.*, 558 F. Supp. 1042, 1045 (D. Utah 1983); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 682-83 (N.D. Ga. 1983). Nevertheless, the Seventh Circuit rejected this reasoning as impractical in the case below. *Haroco*, slip op. at 40. A civil plaintiff, at the time of the filing of the complaint, prior to discovery, does not have available to him the same amount of evidence and information normally available to a grand jury before it returns an indictment in a criminal case, and a mere complaint, no matter how specifically pleaded, cannot very well establish "probable cause."

A subsidiary question arising under the specificity problem is whether or not the plaintiff in a civil RICO action must plead and prove prior convictions for the predicate offenses. The Second Circuit so held in *Sedima*, 741 F.2d at 496. The Seventh Circuit has previously held that prior criminal convictions for underlying offenses is not a prerequisite for a civil RICO action. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983). In *Haroco*, the court states that "[t]he issue is not presented in this appeal." Slip op. at 18, n. 12. Nevertheless, the court has remanded the case to the district court for further proceedings upon a complaint in which prior convictions of the defendants are not alleged. *See* Petition for Writ of Certiorari A-57—A-69. In light of the *Sedima* decision, that possible deficiency is certain to become an issue before the

district court. Considerations of judicial economy ought to dictate that this issue be resolved with all the others, since the development of a record below would not in any way affect the resolution of such a purely legal question.

In summary of this point, it is clear that the United States Courts of Appeals and the Federal District Courts have divided seriously on a great number of statutory construction issues surrounding the civil liability provisions of the Racketeer Influenced and Corrupt Organizations Act. The resulting confusion demands resolution which can only come from the United States Supreme Court, and the petition for writ of certiorari should be granted in order to restore order to this field of the law.

II

The proper construction of the Racketeer Influenced and Corrupt Organizations Act is an important issue of federal law which has not been decided by this Court but should be.

On two occasions, this Court has addressed the criminal aspects of the Racketeer Influenced and Corrupt Organizations Act, *Russello v. United States*, 104 S. Ct. 296 (1983); *United States v. Turkette*, 452 U.S. 576 (1980); but has yet to address the civil aspects of the law. As indicated in the preceding section of this brief, there are, or may be, differences in the interpretation or application of the statute based upon some fundamental differences between civil and criminal litigation. Consequently, this Court's criminal RICO decisions do not necessarily address the issues raised in the context of this case.

Aside from the sheer volume of recent civil RICO cases, and the impact upon the industry we represent, to

which we earlier alluded, and aside from the inconsistent decisions among the circuits, the interpretation of the civil provisions of RICO presents an important question of federal law in its own right.

We respectfully submit that it is essential to arrive at some sensible reconciliation between legislative intent and the language used in the law where Congress has clearly expressed a limited intent, and then painted with a broad brush. That is the case with civil RICO.

Contenders in opposing judicial camps profess to be relying upon the "plain meaning of the statute" in the exegesis they have performed, *Bankers Trust Co. v. Rhoades*, 741 F.2d at 517; *Furman v. Cirrito*, 741 F.2d at 528, and yet they reach diametrically opposed results, neither of which seem entirely satisfactory. If those courts, such as the Seventh Circuit here, are correct in holding that there is no requirement of a special "racketeering injury" above and beyond injury stemming solely from the commission of the predicate offenses, then the effect will be to federalize virtually every kind of fraud, which is normally compensable under state common law anyway, and to impose upon those who have committed simple fraud the treble damages and attorney's fee awards called for by the statute. That could hardly have been the intent of Congress in enacting a law specifically aimed at "eradicating organized crime from the social fabric." *United States v. Turkette*, 452 U.S. at 585. (*See also Russello v. United States*, 104 S. Ct. at 302-03; Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (1970)). The Seventh Circuit acknowledges as much:

> [I]t does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute.

Haroco, slip op. at 29.

On the other hand, if those courts, such as the Second Circuit in the *Sedima* trilogy, are correct in requiring a prior criminal conviction or an ill-defined special racketeering injury as a prerequisite to a civil RICO action, then the statute is entirely gutted. It has little or no meaning or impact, even upon organized crime. *Bankers Trust Co. v. Rhoades*, 741 F.2d at 522-23 (Cardamone, J., dissenting). That also could not have been the intent of Congress. (The only cure for this may be to develop a workable definition of "special racketeering injury.")

Yet if the "plain meaning of the statute" yields no workable answer to the issues raised by the civil RICO cases, the legislative history proves an equally unsatisfactory point of departure. Very nearly the only way in which the intent of Congress, in dealing with "organized crime," can be carried out under this statute is for the courts to require proof of some nexus between the defendant and what is commonly conceived of as "organized crime"—La Cosa Nostra, the Mafia, and so forth. However, virtually all of the courts which have considered this approach have rejected it, and correctly so. See cases collected in Note, *Prime Rate Fraud Under RICO*, 72 Georgetown L.J. 1885, 1894 n. 71 (1984). Such a requirement would do violence to the language of the statute, present insuperable problems of definition, and create the constitutional difficulties endemic to any type of "status crime" legislation. Yet at the same time, the Second Circuit is entirely correct in stating that there is nothing whatsoever in the legislative history of RICO which indicates an intent on the part of Congress to brand "such respected and legitimate 'enterprises' as the American Express Company,

E. F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch . . . as 'racketeers.'" *Sedima*, 741 F.2d at 487.

It is beyond the scope of this brief for the American Bankers Association to suggest where the line might be drawn in this important and confusing matter. We simply offer the foregoing to show that the line must be drawn, and that at this point it is only the Supreme Court which can draw it. The petition for writ of certiorari should be granted in order to do so.

CONCLUSION

For all of the reasons stated herein, the American Bankers Association as amicus curiae hereby respectfully urges the Court to grant the petition.

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